

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN JASON HAMMOND,

Defendant-Appellant.

UNPUBLISHED

June 23, 2011

No. 296055

Antrim Circuit Court

LC No. 09-004275-FC

Before: WHITBECK, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by right from his jury convictions of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b, and one count of kidnapping–custodial interference, MCL 750.350a(1). Defendant was sentenced to four concurrent prison terms of 270 to 480 months for CSC and to a concurrent term of one year for kidnapping. We affirm.

The prosecution alleged that defendant, complainant’s stepfather, engaged in sexual activity with complainant on various occasions when complainant was under 16 years of age. The prosecution also alleged that defendant and complainant’s mother assisted complainant in running away from her foster home and allowed her to reside with them.¹

Defendant moved in limine to exclude other acts evidence regarding his sexual assaults of other minor family members. The evidence included allegations that defendant assaulted complainant and complainant’s sister and as a result was convicted by pleas of attempted second-degree criminal sexual conduct, MCL 750.520c; MCL 750.92, and that defendant assaulted his 11 year old niece in 1991. In response, the prosecution argued that the other acts evidence was admissible pursuant to MCL 768.27a and MRE 404(b) as evidence of defendant’s propensity to be sexually involved with minors. The trial court admitted all other acts evidence under MRE 404(b).

¹ Complainant’s mother had had her parental rights to complainant and complainant’s sister terminated before this time.

At trial, complainant testified that she and defendant engaged in various forms of sexual activity, including penile-vaginal intercourse; complainant's sister, who was 15 years old at the time of trial, testified that defendant touched her vagina with his fingertips and inserted his finger into her vagina. Additionally, defendant's niece testified that defendant touched her vagina with his fingers and mouth and inserted his finger into her vagina on various occasions when she was between seven and 11 years old.

On appeal, defendant first argues that the trial court abused its discretion regarding several evidentiary rulings. Specifically, defendant argues that the trial court abused its discretion by admitting other acts evidence, by denying defendant the opportunity to cross examine complainant regarding a movie that defendant believed would have established complainant's motivation for fabricating her allegations, and by precluding defendant from questioning complainant's mother about the circumstances surrounding his (defendant's) prior CSC convictions. We disagree.

"This Court reviews a trial court's determination of evidentiary issues for an abuse of discretion." *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007). We review unpreserved issues for plain error that affects a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 1205 (1999).

The trial court did not abuse its discretion by admitting evidence of defendant's past CSC convictions involving complainant and her sister and defendant's past sexual misconduct with his niece. Those acts were admissible pursuant to MCL 768.27a, which provides in pertinent part that, "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." MCL 768.27a(1). "A defendant's propensity to commit criminal sexual behavior can be relevant and admissible under the statutory rule to demonstrate the likelihood of the defendant committing criminal sexual behavior toward another minor." *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008). MCL 768.27a does not require a defendant to have been convicted of the previous act for that act to be admissible. *Id.* Moreover, the statute does not contain a temporal limitation. The remoteness of the other act affects the weight of the evidence rather than its admissibility. *People v McGhee*, 268 Mich App 600, 611-612; 709 NW2d 595 (2005). The other acts evidence of defendant's sexual assaults of complainant, complainant's sister, and defendant's niece was admissible under MCL 768.27a.² Furthermore, we hold that the probative value of the evidence was not outweighed by the danger of unfair prejudice. MRE 403.

² We reject defendant's unpreserved argument that admission of evidence under MCL 768.27a violates defendant's right to equal protection under the law. Defendant has not overcome the burden of establishing that MCL 768.27a is not rationally related to a legitimate government interest. See also *People v Pattison*, 276 Mich App 613, 620; 741 NW2d 558 (2007).

We also reject defendant's argument that the trial court erred by failing to give a cautionary instruction regarding other acts evidence. At a minimum, defendant forfeited

Defendant's assertion that the trial court denied him the opportunity to present a defense by precluding him from cross examining complainant regarding a movie³ that he believed would have established complainant's motive for fabricating her allegations against him is without merit. Defendant's theory of the case was that complainant's allegations were false and that she alleged that he sexually assaulted because she was angry at him and wanted him out of her life. But defendant cross examined complainant regarding her allegations and presented his theory in that manner. Defendant's inability to discuss the movie did not limit his ability to present a defense. The trial court's decision to preclude discussion of the movie did not constitute an abuse of discretion. MRE 401, 403.

Finally, defendant's assertion that the trial court abused its discretion by precluding him from questioning complainant's mother about the circumstances surrounding his prior CSC convictions is without merit. Defendant explained those circumstances during his own testimony; therefore, the court's exclusion of complainant's mother's testimony was not unfairly prejudicial and did not deny defendant a fair trial.

Next, defendant argues that several instances of prosecutorial misconduct deprived him of a fair and impartial trial. Specifically, defendant asserts that the prosecutor engaged in misconduct by asking complainant's mother if defendant's previous employer knew that defendant was a registered sex offender and if she believed statements contained in emails between complainant and defendant, by asking defendant to comment on his niece's credibility, by implying that defendant could be convicted based on conduct between defendant and complainant that occurred after complainant turned 16 years of age, by stating during closing argument that defendant did not inform jail personnel about his penis tattoo, and by noting during closing argument that defendant did not claim innocence during his direct examination. We disagree.

A claim of prosecutorial misconduct is reviewed de novo. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis. The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's

appellate review of this issue by failing to object to the instruction the court did give regarding other acts evidence. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). At any rate, the instruction the trial court gave was similar to CJI2d 20.28a, which is the cautionary instruction regarding claimed other acts of sexual misconduct. The court's instruction was sufficient to instruct the jury on the limited use of the other acts evidence. *People v Martzke (On Remand)*, 251 Mich App 282, 295; 651 NW2d 490 (2002).

Finally, although the trial court admitted the other acts evidence pursuant to MRE 404(b) rather than MCL 768.27a, we find that the trial court reached the right result. Therefore, we decline to consider whether the evidence was admissible under MRE 404(b). See *Pattison*, 276 Mich App at 616.

³ The movie told the story of a teenage girl who killed her mother and engaged in sexual activity with her stepfather in order to have him arrested.

remarks in context. *Id.* Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Thomas*, 260 Mich App at 454. Absent an objection at trial to the alleged misconduct, appellate review is foreclosed unless the defendant demonstrates the existence of plain error that affected his substantial rights. Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, 460 Mich at 763. No error requiring reversal will be found if the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

During cross examination of complainant's mother, the prosecutor asked if defendant's past employer was aware that defendant "was a registered sex offender." Defendant objected to this question and the court sustained the objection based on relevance. Defendant argues that this comment was improper and prejudiced him, but defendant received relief when the court sustained his objection; therefore, he is not entitled to further relief. *People v Miller (After Remand)*, 211 Mich App 30, 42-43; 535 NW2d 518 (1995). The court also instructed the jury to not consider the parties' questions as evidence. Moreover, evidence of defendant's past CSC convictions was presented to the jury. Thus, the prosecutor's question, while improper, did not deny defendant a fair trial.

Also during cross-examination the prosecutor showed complainant's mother emails from defendant to complainant and asked her whether she refused to believe what was said in the emails and what the situation was between defendant and complainant. Defendant did not object to the question; therefore, our review is for plain error. *Carines*, 460 Mich at 763. Generally, it is improper for the prosecutor to ask a witness to comment or opine on the credibility of another witness because credibility is for the jury to determine. *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Although improper, any prejudice could have been cured by a timely instruction. *People v Buckey*, 424 Mich 1, 18; 378 NW2d 432 (1985).

The prosecutor also acted improperly by asking defendant whether defendant's niece was lying about defendant's past sexual misconduct with her. But again, any prejudice could have been cured by a timely instruction. *Id.*; *Leshaj*, 249 Mich App at 419. Defendant has not demonstrated that the unobjected-to question resulted in plain error. *Carines*, 460 Mich at 763.

Defendant's assertion that the prosecutor improperly implied that defendant could be convicted for his behavior with complainant after she turned 16 years old is based on this statement of the prosecutor during closing argument:

He continues to take advantage of [complainant] until her 16th birthday and then continues to take advantage of her after that. Although the law says when you turn 16 you might be able to consent, it's not like a light switch. She has been primed by him to have sex. So when she turns 16 is it still voluntary? You'll hear the judge say no; consent's not an issue. Can you understand that a 14-year-old girl with her background is at any time able to make an informed decision that her sexual relations with her step-father is a good thing; that it's okay? The defendant certainly knows it's not okay.

Defendant did not object to this comment; thus, our review is for plain error. *Carines*, 460 Mich at 763. It is not clear that the prosecutor was implying that the jury could consider the occurrence of sexual behavior between complainant and defendant after complainant turned 16 years old when deciding whether defendant was guilty. Any prejudice would have been cured by a timely instruction. *Leshaj*, 249 Mich App at 419. Moreover, the court instructed the jury that to convict defendant of CSC I it had to find that defendant's sexual conduct with complainant occurred when complainant was less than 16 years of age. No plain error occurred.

Defendant testified that when he was booked into jail he did not inform the jail personnel that he had a tattoo on his penis. The prosecutor mentioned this fact during closing argument in order to attack defendant's credibility. We reject defendant's assertion that the prosecutor's comment violated his Fifth Amendment right to remain silent. Routine booking questions are exempt from the requirements of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and post-arrest, pre-*Miranda* warnings silence may be used to impeach a defendant who testifies at trial. See *Fletcher v Weir*, 455 US 603, 607; 102 S Ct 1309; 71 L Ed 2d 490 (1982). The prosecutor's comment was not improper.⁴

Also during closing argument the prosecutor noted that defendant did not claim innocence on direct examination, but that on cross examination defendant denied that he committed CSC. Defendant's argument that this conduct was improper because the prosecutor knew of defense counsel's ethical limitations and unfairly used defendant's silence regarding his innocence as an implication of guilt is without merit. Defendant did not preserve this issue; therefore, our review is for plain error. *Carines*, 460 Mich at 763. Defendant waived his Fifth Amendment right to remain silent by testifying at trial. *People v Fields*, 450 Mich 94, 109; 538 NW2d 356 (1995). Moreover, defendant cites only policy reasons to support his assertion that the prosecutor should not have raised this issue because defense counsel was precluded by ethical considerations from doing so. Defendant has not demonstrated that the prosecutor's posing of this question resulted in plain error.

Even though some instances of prosecutorial misconduct occurred, defendant has not established that the cumulative effect of the misconduct affected the outcome of the court proceeding. *People v McLaughlin*, 258 Mich App 639, 649; 672 NW2d 860 (2003).

Finally, defendant argues that trial counsel rendered ineffective assistance such that he was denied a fair trial. Specifically, defendant claims that counsel rendered ineffective assistance by failing to object to evidentiary rulings and instances of prosecutorial misconduct such as those discussed above. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel"

⁴ The trial court did not abuse its discretion by denying defendant's motion for a mistrial based on the prosecutor's comment. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010).

guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. *Id.* To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different and that the result that did occur was fundamentally unfair or unreliable. *People v Seals*, 285 Mich App 1, 16; 776 NW2d 314 (2009). Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *Id.*

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. The court must find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. A trial court's findings of fact are reviewed for clear error; its constitutional determinations are reviewed de novo. *Seals*, 285 Mich App at 16. Defendant did not move for a new trial or request an evidentiary hearing on a claim of ineffective assistance of counsel; therefore, we may only review the record for apparent errors. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

Defendant has failed to state with specificity how counsel's alleged errors resulted in prejudice, and has not supported his assertions with citations to authority. Thus, we consider his claims to be abandoned. *People v Hubbard*, 156 Mich App 712, 714; 402 NW2d 79 (1986); see also *People v Federico*, 146 Mich App 776, 797; 381 NW2d 819 (1985). Moreover, our review of the record reveals that any errors of counsel's did not result in prejudice to defendant. *Carbin*, 463 Mich at 600.

We affirm.

/s/ William C. Whitbeck

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly